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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

SAM GIANCANA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

MOTION TO STAY EXECUTION OF COMMITMENT FOR CONTEMPT

The petitioner, Sam Giancana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming petitioner's commitment for civil contempt and affirming the denial of his writ of habeas corpus.

If said writ of certiorari is issued, petitioner prays that a stay of execution of petitioner's commitment for contempt issue pending argument and decision on the merits in this Court.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the appendix to this petition. App. 1a-11a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, before applying an immunity statute to a witness before a grand jury, the trial court must find that the questions put to the witness are relevant to alleged violations set forth within the immunity statute?

2. Whether Congress intended 47 U.S.C. § 409(L) to be strictly construed to limit grants of immunity to testimony bearing a substantial relation to the subject matter of the immunity statute, namely, violations of the Federal Communications Act?

3. Whether the petitioner was entitled to rely on the Fifth Amendment when the trial court refused to rule on the relevance of grand jury questions to violations of the Federal Communications Act?

4. Whether there was sufficient evidence before the trial court for either the petitioner or the court to find that the grand jury questioning bore a substantial relation to violations of the Federal Communications Act?

5. Whether the conflict among four Circuit Courts of Appeals on the scope and applicability of immunity statutes to witnesses appearing before grand juries requires resolution by this Court in this case?

6. Whether the Court of Appeals may rely upon evidence not before the trial court in order to affirm findings of civil and criminal contempt?

STATUTE INVOLVED

Section 409(L) of the Federal Communications Act, c. 652, 48 Stat. 1096, 47 U.S.C. § 409(L) provides:

> "No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

STATEMENT OF THE CASE

On June 1, 1965, the United States District Court for the Northern District of Illinois entered an order pursuant to 47 U.S.C. § 409(L) directing the petitioner to testify before a grand jury of that court. On the same day, the court found the petitioner in contempt for failure to comply with said order and directed the United States Marshal to confine him until he chose to obey. On June 2, 1965, the court de-

nied a petition for writ of *habeas corpus* filed by the petitioner. On appeal from both the judgment of contempt and the denial of his writ of *habeas corpus*, the Seventh Circuit Court of Appeals affirmed. The petitioner now seeks a writ of certiorari from this Court.

Proceedings in the Trial Court

The petitioner, Sam Giancana, was served with a subpoena to appear on May 14, 1965, before a grand jury of the United States District Court for the Northern District of Illinois. The subpoena failed to specify or limit in any way the subject matter of the inquiry; it simply ordered the petitioner to appear "to testify in behalf of the United States generally." R. 6.[1]

Before being sworn on May 14, 1965, the petitioner, on advice of his counsel, inquired of the grand jury and the Assistant United States Attorney present whether he was a prospective defendant. The Assistant United States Attorney replied that he was. Exhibit B, pp. 31-33.[2]

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[1] All citations designated by "R" refer to the Appendix in petitioner's brief in the Seventh Circuit Court of Appeals, copies of which have been filed with this Court.

[2] Exhibits B, C, and D refer to the grand jury transcripts of petitioner's appearance before the grand jury on May 14, May 19, and May 27, 1965, respectively. These transcripts were placed in evidence during the initial hearings on May 27, 1965, before the Chief Judge William J. Campbell in the United States District Court for the Northern District of Illinois. These exhibits were sealed except for use by the petitioner and the attorneys of record in this proceeding.

Exhibit E is the transcript of petitioner's appearance before the grand jury on June 1, 1965, subsequent to the order to compel testimony entered by the trial court on that same date. It was not introduced into evidence in the trial court. It was first made a part of the record in this case on motion of the United States in the Seventh Circuit Court of Appeals. The court order granting said motion is reprinted in the Appendix to this Petition. App. 11a.

Petitioner has moved that all of these transcripts be filed with this Court in support of this petition.

On May 14, 1965, and again on May 19, the petitioner was questioned extensively on his associations and activities. After stating his name and address, the petitioner invoked his privilege against self-incriminaton under the Fifth Amendment in answer to every question. It is conceded that his invocation of the Fifth Amendment was proper on these occasions. R. 8, 13.

On May 27, 1965, the petitioner was called back again before the grand jury. The Government was represented by the United States Attorney for the Northern District of Illinois, Mr. Hanrahan, who addressed the grand jury as follows, Exhibit D, p. 2:

> "Madam Foreman, as United States Attorney I would ask you and the jury to invoke the provisions of Section 409 (L) of Title 47 of the United States code, and that section which is a part of the Federal Communications Act relates to self-incrimination.
>
> I will read it to you and I will ask you, the Grand Jury, to invoke it."

This section provides in relevant part that no person may refuse to testify "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of" the Federal Communications Act.

The grand jury invoked this section in accord with Mr. Hanrahan's request. When the petitioner continued to invoke the Fifth Amendment, the grand jury ordered him to appear before Chief Judge William J. Campbell. Exhibit D, 6-7.

In open court, the United States Attorney petitioned the court for an order (1) directing the petitioner "to testify and give evidence" before the grand

jury; (2) directing him not to invoke the Fifth Amendment; and (3) informing him that he had immunity as to all matters to which he testified except for perjury in the testimony itself. R. 7-10. On the request of counsel for the petitioner, the Chief Judge continued the hearing until June 1, 1965, to permit counsel to better advise his client.

June 1. Hearing: Trial Court Refused to Rule on the Relevance of Any Questions to the FCC Act

On June 1, 1965, counsel for the petitioner made two requests: (1) that the United States Attorney identify from the prior grand jury sessions the questions he wished to have answered, and (2) that before any new matters were inquired into, the United States Attorney return to the court for a further order. R. 17.

The purpose of the requests was to permit the court to pass on whether the questions to be asked bore any substantial relation to criminal violations within the scope of the FCC immunity statute, a finding required by the statute before it could apply. R. 17. The court's order to compel testimony could then be restricted to those questions which exhibited such a relationship.

The court refused the requests. The court's rationale is clearly delineated in the colloquy between court and counsel for the petitioner. To show the need for the designation of questions, counsel for the petitioner pointed to two portions of the prior grand jury sessions where the questions failed to bear any possible relationship to activity within the scope of any provision of the FCC Act. R. 18. These portions are Exhibit B, pp. 46-47, and Exhibit C, pp. 301-07. The court responded:

> "From a hasty glancing at them [the questions] I would be inclined to agree with you. But what is the relevance of that? . . . how in the world can he be incriminated with the type of immunity that has already been granted him by the Statute, *whether these* [questions] *relate to FCC or SEC?*" R. 18.

And, in fact, the later order to compel testimony was so broad that, according to the court, even if the petitioner, unsolicited,

> "blurts out to the Grand Jury, 'I got a parking ticket here and a summons to appear in the Municipal Court' he gets immunity." R. 25-26.

The court refused to limit its order to designated questions because it did not believe it had the power to do so. In answer to petitioner's reliance on *United States* v. *Harris,* 334 F.2d 460 (2d Cir. 1964) as support for his requests, R. 18-19, the court stated that the grand jury had inherent power "to investigate *any matters* that might possibly involve *any* violation of Federal Law," R. 20. (Emphasis added.) As a result, a restriction of its order to certain designated questions

> "such as counsel suggests is clearly outside the authority of this Court, and even if issued the Grand Jury would not have to follow it. Accordingly your request is denied." R. 20.

For this same reason, the court then extended its order to compel testimony not only to all questions already asked, but to "all other matters propounded to him by the Grand Jury. . . ." R. 21.

The full oral order to the petitioner was as follows:

". . . . the immunity heretofore extended by the statement of the Foreman of the Grand Jury . . . will protect you against any possible incrimination, State or Federal, in any possible jurisdiction. It is complete, permanent and absolute, and under such complete immunity *I now order and direct you* to return and answer fully the questions already propounded to you . . . *and any other questions* that the Grand Jury may, in the discretion of its Foreman, permit to have asked you." R. 21. (Emphasis added).

The written order, entered at a later time, would indicate that the court accepted as a sufficient basis for its order the conclusory allegations of the Government's petition. R. 13.

No Party Even Alleged that a Single Question Was Relevant to the FCC Act

Not only did the court refuse to find a single question relevant to an FCC violation, but no party to the litigation even alleged it.

In the affidavit in support of his petition for an order directing the appellant to testify, the United States Attorney stated the following with respect to the subject matter of the grand jury inquiry, R. 10-11:

"2. The Grand Jury for the Northern District of Illinois is presently conducting an investigation of alleged conspiracy and other illegal activities in said District and elsewhere.

3. The said investigation involves possible violations of the following Federal Statutes:

1) Title 18, United States Code, Section 371
2) Title 18, United States Code, Section 1951
3) Title 18, United States Code, Section 1952
4) Title 18, United States Code, Section 201
5) Title 18, United States Code, Section 594

6) Title 18, United States Code, Section 597
7) Title 21, United States Code, Section 174
8) Title 26, United States Code, Sections 7201 and 7206
9) *Title 47, United States Code, Sections 203 and 501*

4. There is reason to believe that one Sam Giancana possesses information and can give testimony and produce evidence before said Grand Jury which would assist it in its aforesaid investigation." (Emphasis added).

The petition itself repeats paragraphs 2 and 3 of the affidavit verbatim and paragraph 4 in substance. R. 7-10.

During the hearings on the motions, the United States Attorney failed to elaborate in any way on the subject matter of the inquiry or the relation of any questions to specific violations, even after the petitioner made this an issue.

Clearly, Mr. Hanrahan's affidavit fails to connect any one question or group of questions to a violation of the FCC Act. For all the record shows, the questions may have been intended to relate only to the other "many possible Federal violations" the grand jury was investigating. (Exhibit C, p. 271). The questions themselves are not much help. For neither the grand jury, the government, the trial court, nor even the Court of Appeals have yet stated what elements or facts constitute a violation of the FCC Act. Without knowing this, one cannot judge the context of the questions.

47 U.S.C. §§ 203, 501

It is worth noting at this point the content of the sections of the Federal Communications Act to which Mr. Hanrahan referred.

Section 501 of Title 47 is the general penalty provision for the Federal Communications Act making it a misdemeanor for any person to "willfully and knowingly" do or cause an act to be done in violation of any other provision of the Act. Obviously, under this section, no one, including the petitioner, could be convicted unless some other section of the Act were involved. The only other section mentioned in the proceedings is Section 203.

Section 203 is directed exclusively to common carriers under the jurisdiction of the FCC. It states: "Every common carrier . . . shall file with the Commission" its rate and tariff schedules; the section sets out the mechanics whereby changes can be made; and it prohibits carriers from engaging in discriminatory rate practices, rebates, and so forth. Significantly, the section carries its own penalty provision, Section 203(e), which provides that a carrier shall be fined "in case of failure or refusal on the part of any carrier to comply with the provisions of this section." The reasonable inference from this penalty provision is that it is co-extensive with the intended scope of the section. In other words, only a common carrier under the jurisdiction of the FCC can violate the section.

The petitioner is obviously not a common carrier within the meaning of these sections. Nor do any of the statements of the parties or the questioning mention such a common carrier. There is nothing in the record to suggest that the petitioner has ever aided such carrier to file discriminatory rates or accept rebates or violate Section 203 in any other way.

Finding of Contempt

As already noted, the trial judge granted the petition of the United States Attorney and ordered the petitioner to answer any and all questions put to him by the grand jury. On returning to the Grand Jury, the petitioner once again refused to answer any questions other than his name and address. R. 29.

The petitioner was immediately brought before Chief Judge Campbell on petition of the United States Attorney to enforce the court's order to compel testimony. The petitioner informed the court that he had refused to answer the qusetions put to him and that he would continue so to do. R. 31. The court then entered the following oral judgment. R. 31:

> "I adjudge the respondent, Sam Giancana, in direct and continuing contempt of this Court for disobedience of its lawful order, and I commit the respondent, Sam Giancana, to the custody of the United States Marshal there to remain until he obeys the lawful order of the Court."

On June 2, 1965, a petition for *habeas corpus* was filed and denied. R. 38-43. The petitioner filed notices of appeal from the judgment of commitment and the denial of the writ of *habeas corpus*. R. 35, 44-45.

All Motions to Stay Commitment Denied

Petitioner moved immediately in the trial court to stay execution of his commitment for contempt pending appeal. The motion was denied. R. 31-32. A similar motion was denied by the Court of Appeals on June 10, 1965, and by the Circuit Justice, the Honorable Tom C. Clark, on June 15, 1965.

After filing his brief in the Court of Appeals setting forth the substantial questions raised, petitioner

renewed his motion for stay. It was denied by the Court of Appeals on July 19, 1965, and by Mr. Justice Clark on August 4, 1965.

At the conclusion of the appellate argument on September 16, 1965, petitioner renewed his motion pending decision by the Court of Appeals. The court reserved decision and filed its opinion on the merits on October 8, 1965.

The term of the grand jury before whom the petitioner was called does not expire until June 1966.

REASONS FOR GRANTING THE WRIT

I. FOUR CIRCUITS HAVE REACHED CONFLICTING DECISIONS IN APPLYING IMMUNITY STATUTES

The first immunity statute was passed in 1857 and granted immunity from prosecution for all testimony given before Congressional committees. 11 Stat. 156 (1857). However, so many criminals arranged to get before Congress to confess to their crimes that the act was amended in 1862 only to exclude the testimony itself before a congressional committee from any later criminal proceeding, but no longer to immunize the witness against prosecution. *The Federal Witness Immunity Acts,* 72 Yale L.J. 1568, 1572 (1963). In other words, the fruits of the testimony could be used to collect further evidence. A similar statute was passed in 1868 for all judicial proceedings no matter what their subject matter. *Ibid.* It was this later statute that was found unconstitutional in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), on the ground that the protection was insufficient.

Following this early unsuccessful experience with broad immunity statutes, Congress limited all further legislation to narrowly defined immunity statutes cal-

culated primarily to aid administrative agencies in the enforcement of regulatory legislation. 72 Yale L.J. at 1573-74. 47 U.S.C. § 409(L) is just such an immunity statute, passed as part of the Federal Communications Act in 1934.

More recently, Congress has passed immunity statutes to aid the Department of Justice in the enforcement of primarily criminal rather than regulatory type laws. These include 18 U.S.C. § 3486 passed in 1954 applicable to internal security matters and 18 U.S.C. § 1406 passed in 1956 as part of the Narcotics Control Act. Altogether, there are now over 40 immunity statutes on the books.

The constitutionality of immunity statutes was upheld in the early case of *Brown* v. *Walker,* 161 U.S. 591 (1896). However, the scope and applicability of these statutes to a witness appearing before a grand jury did not become a serious subject of judicial decision until the 1960s. Since 1962, four separate Courts of Appeals have rendered conflicting decisions, and, except for the District of Columbia Circuit, have shown an inexcusable laxity in affording witnesses even minimal procedural rights.

District of Columbia Court of Appeals

In *In Re Bart,* 304 F.2d 631 (D.C. Cir. 1962), a witness was called before a grand jury and refused to answer questions concerning his status as an officer of the Communist Party. The Government then moved pursuant to 18 U.S.C. § 3486 for an order compelling the witness to answer. The statute provides that a witness, in exchange for immunity, may be compelled to testify "in any case or proceeding before any grand jury or court of the United States involving any inter-

ference with or endangering of . . . the national security or defense," by acts which constitute violations of, *inter alia*, the Internal Security Act. The government's application for an order pursuant to § 3486 failed to specify the section of the Internal Security Act whose violation it was investigating and failed to allege that the national security was endangered. It did set forth the 35 questions that the witness had failed to answer. *Id.* at 634. After allowing counsel for the witness to present oral argument, the court granted an order on the government's papers compelling the witness to answer the 35 questions and "to testify . . . with respect to such matters under inquiry before said grand jury." *Id.* at 633. When the witness continued his refusal to testify, he was found in civil contempt from which he appealed. *Ibid.*

The Court of Appeals reversed. It held that before the trial court could apply the statute, the witness was entitled to a notice and hearing. *Id.* at 637. It further held that the court's order compelling testimony must be based on "the allegations and the evidence submitted." *Id.* at 636. The court noted that Congress intended to permit applicability of the statute only where (1) the national security was endangered and (2) the proceeding involved violations of the Internal Security Act. *Id.* at 634-36. The court stated that it was the "government's burden to persuade the court" these conditions had been met and that

> "government counsel must describe the subject matter of the investigation with enough particularity to enable the judge to determine for himself whether any danger to the national security or defense is involved." *Id.* at 637.

The court noted that in most cases a very brief description of the investigation would do, but that for "other matters, less clearly connected with the national security" more detail would be necessary. Finally, the court noted that the trial "court's ruling should rest on a sworn statement." *Id.* at 637.

Bart also considered the fact that the initial order would not cover all further questioning, but that "it will be time enough, later, to object to the relevancy of the questions asked." *Ibid.*

Section 3486 differs from 47 U.S.C. § 409(L) in that it requires the approval of the Attorney General before a United States Attorney may apply to the court for an order compelling testimony. Except for this condition, the actual course of the proceedings in the trial court in *Bart* were almost identical to those in the case at bar.

Second Circuit Court of Appeals

In *United States* v. *Harris,* 334 F.2d 460 (2d Cir. 1964), Harris was called as a witness before the grand jury. The subject matter of his interrogation "concerned a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida." *Id.* at 462. He refused to answer questions and was offered immunity pursuant to 47 U.S.C. § 409(L), the same statute involved in the case at bar. A court order to compel testimony was obtained. On his continued refusal to testify, Harris was found in criminal contempt and sentenced to one year.

On appeal, the Second Circuit upheld the application of § 409(L). As in *Bart,* the court found that the statute was of limited application and that

"immunity extends to all testimony thus compelled *insofar as that testimony bears a substantial relation* to the subject matter of the immunity provision." *Id.* at 462. (Emphasis added).

Upon application of this rule to the facts, however, the Second Circuit departed from *Bart* substantially. The government argued that the applicable telephone company tariffs provided that telephone service shall "not be used for an unlawful purpose", and that when an individual so used the phone, he caused the telephone company to violate its tariff and, in turn, to violate the relevant sections of the FCC Act, 47 U.S.C. §§ 203, 501. Thus, the single call was sufficient basis for invocation of Section 409(L).

The Second Circuit balked at this argument and did not base its decision on it. Rather, it chose to speculate that "further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises . . . ." Such a revelation would indeed constitute a violation of the FCC Act, "at least to the extent of any participation by telephone company representatives." *Id.* at 463. Unfortunately, there was not the slightest evidence in the record to support this speculation.[8] The questions related only to the single call.

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[8] In fact, during one of the earlier hearings in the trial court in this case, the court asked if there were any further evidence that the United States Attorney planned to introduce to support his allegation of violations of the FCC Act. United States Attorney was unable to come up with any further telephone calls, but himself speculated that since the dice game was a big one, "there had to be" other telephone calls in order to set up the premises. See Appellant's Appendix, *United States* v. *Harris*, Docket No. 28254, United States Court of Appeals for the Second Circuit, at pp. 63a-64a. Needless to say, two speculations do not add up to one fact.

Thus, while the Second Circuit follows *Bart* in holding that immunity statutes are of limited applicability, it is willing to approve their use on the basis of its own speculation rather than "the allegations and evidence submitted" (*In Re Bart*, 304 F.2d at 636).[4]

Although *Harris* is now before this Court on a grant of certiorari, the grant was limited to procedural questions on the finding of contempt not raised in the case at bar. *Harris* v. *United States*, 379 U.S. 944.

Third Circuit Court of Appeals

In *Marcus* v. *United States*, 310 F.2d 143 (3rd Cir. 1962), Marcus was called as a witness before a grand jury. He was asked whether he had appealed to the Massachusetts Public Utilities Commission in 1955 because "the telephone company had refused to install twelve phones in his office", and generally questioned on unlawful use of phones to transmit gambling information. *Id.* at 145. He refused to answer all questions. The grand jury invoked 47 U.S.C. § 409 (L), and the court entered an order directing Marcus "to answer . . . all questions propounded to" him. *Id.* at 147-48. Upon his continued refusal to answer, the trial court imposed a six-month sentence for contempt. *Ibid.*

---

[4] The Second Circuit has followed its "substantial relation" test in several cases since *Harris*. It has broadened this test only with respect to the narcotics immunity statute, 18 U.S.C. § 1406, where, after a detailed examination of legislative history and the facts in that case, it permitted questioning to move into the area of gambling. *United States* v. *Tramunti*, 343 F.2d 548 (2d Cir. 1965). The rationale of *Tramunti*, however, is not applicable to this case. In *United States* v. *Pappadio*, 346 F.2d 5 (2d Cir. 1965) and *United States* v. *Shillitani*, 345 F.2d 290 (2d Cir. 1965), the opinions fail to indicate that a substantial issue of relevance was raised by the appellant, although the court still notes its prior relevancy test in *Harris*, 345 F.2d at 293.

On appeal, the Third Circuit affirmed. It held that the questions themselves indicated that the grand jury was investigating violations of the FCC Act, *id.* at 146, 148, and that "the grand jury might well have occasion to indict a telephone company" for violations of the Act, *id.* at 148. As a result, the court held that "the proceeding" was one based on violations of the FCC Act to which the immunity statute properly applied. *Id.* at 147.

Up to this point, *Marcus* is not too far from the decisions in *Bart* and *Harris*. But the similarity there ceases, for once the "proceeding" is found to concern the FCC Act in any way, the Third Circuit gives the grand jury free reign. The witness had apparently complained in the trial court that the order to compel testimony was not limited to questions related to the FCC Act. On appeal the Third Circuit treated this objection as follows:

> "Equally unfounded is appellant's assumption that his testimony must be limited to violation of that Act, and that the Court should not have directed him to answer *all* questions. A witness cannot control the scope of a grand jury investigation or challenge the relevancy of questions asked." *Id.* at 147 n. 2. (Emphasis in original).

In *United States* v. *Testa*, 326 F.2d 730 (3rd Cir. 1964), the Third Circuit affirmed *per curiam* on the basis of *Marcus* a commitment for civil contempt of a grand jury witness who refused to testify pursuant to an order compelling testimony under 47 U.S.C. § 409(L). The facts, however, as set forth in the dissent of Judge Kalodner from a denial of a rehearing *en banc*, were substantially different from *Marcus*. Whereas *Marcus* involved the large scale use of phones for gambling purposes with knowledge of their use

on the part of the telephone company, *Testa* did not. As put by the dissent:

> "In this case, the questions put to the appellant were not self-revealing; he was asked whether he owned, rented or visited a summer place in New Jersey, whether he made certain specific calls to specific numbers, and as to some, whom he spoke to and the purpose." *Id.* at 732.

The dissent concluded:

> "Nothing is apparent from these questions, least of all that they concerned any alleged violation of the Federal Communications Act, as in Marcus." *Ibid.*

The dissent did not see how the single or sporadic use of a telephone for an unlawful purpose could violate 47 U.S.C. §§ 203, 501. *Id.* at 734.

On the basis of these two decisions, it is apparent that in the Third Circuit, Section 409(L) can be invoked on the single or sporadic use of a telephone for an alleged unlawful purpose, and that questioning can then range to any other subject the grand jury chooses without the witness being able to object.

Seventh Circuit Court of Appeals

In the case at bar, the trial court went further than any other court on record. It granted an order to compel testimony pursuant to 47 U.S.C. § 409(L) on the naked conclusory allegation of the United States Attorney that the grand jury was investigating undescribed violations of nine separate statutes, one of them the FCC Act. Moreover, the court refused to rule on the relevance of a single question to the FCC Act on the ground that immunity under Section 409 (L) applied whether the questions "relate to FCC or SEC" or even municipal parking tickets.

The Seventh Circuit affirmed on the basis of a clear misinterpretation of this Court's decision in *Brown* v. *United States*, 359 U.S. 41 (1959).

In *Brown*, the Court upheld an application of the immunity statute under Part II of the Interstate Commerce Act, 49 U.S.C. § 305(d). The relevance of the grand jury questions was conceded. *Id.* at 42. The Court of Appeals' opinion indicates that all questions related to the activities and ownership of a trucking company operating under a certificate of convenience and necessity from the ICC, admittedly relevant interrogation. *United States* v. *Brown*, 247 F.2d 332, 334 (2d Cir. 1957).

The question actually before the Court in *Brown* was whether Section 305(d) adequately incorporated the immunity section of Part I of the Interstate Commerce Act, 49 U.S.C. § 46. The petitioner had claimed that the incorporation was defective because it incorporated only part of Section 46 and therefore failed to give immunity commensurate with the Fifth Amendment as required by the early case of *Brown* v. *Walker*, 161 U.S. 591 (1896). The Court, in the portion cited by the Seventh Circuit, App. p. 4a, found the incorporation adequate. 359 U.S. at 46.

The Four-Way Conflict Requires Resolution by This Court

The decisions of the four aforementioned Courts of Appeals cover the spectrum on the interpretation and scope of immunity statutes as applied to witnesses appearing before grand juries, each varying substantially from the next. Of the four, only the District of Columbia Court of Appeals interprets and applies immunity statutes in accord with the intent of Congress, an intent that will shortly be set out in detail.

The worst is undoubtedly the case at bar where the trial court held that none of the questions need be relevant to the subject matter of the immunity statute, and that, if the United States Attorney alleges that one of the many statutes involved is the FCC Act, then immunity will even apply to testimony that relates only to Chicago municipal parking tickets. The Seventh Circuit approves.

One of the duties of this Court is to resolve serious conflicts between the differing Courts of Appeals. In view of the conflict here and the manifest injury to the petitioner who has already incurred five months of incarceration, a writ of certiorari should be granted in this case.

II. SEVENTH CIRCUIT IGNORED CONGRESSIONAL INTENT THAT IMMUNITY STATUTES BE NARROWLY CONSTRUED

In relevant part, 47 U.S.C. § 409(L) provides that no person may refuse to testify "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of" the Federal Communications Act. The fact that the statute is limited to alleged violations of the Federal Communications Act is not legislative inadvertence but is part of the long developed history of immunity statutes.

As already noted, Congress limited immunity statutes primarily to regulatory type legislation after its early unhappy experience with general immunity statutes. See pp. 12-13, *supra*. Moreover, the legislative history of 47 U.S.C. § 409(L) would indicate that Congress thought of the immunity section primarily in terms of use before the Federal Communications Commission whose jurisdiction is limited to the subject matter of the FCC Act rather than use before grand juries whose power of investigation is unlimited. Sec-

tion 409 of the Act is entitled "Hearings" and generally concerns the procedural rules and powers of the Commission in conducting its hearings. The House and Senate Reports fail to mention subsection (L) and simply state: "Section 409 relates to proceedings before the Commission." S.Rep. No. 781 and H.Rep. No. 1850, 73d Cong., 2d Sess. (1934).

Only in recent years, with the advent of immunity statutes designed primarily for criminal rather than regulatory type legislation, has Congress had reason to consider their application to witnesses before grand juries. And rather than abandon its stress on their limited applicability, Congress has increased its concern. For example, 18 U.S.C. § 3486 (which was the immunity statute before the court in *In Re Bart, supra*) specifically mentions testimony "in any case or proceeding before any grand jury . . . ." In construing the section, *Bart* noted that Congress expressly limited the section "to protect the public from wholesale 'immunity baths'" "'lest it become a loophole for the escape from punishment for the guilty.'" 304 F.2d at 634; H. Rep. No. 2606, 83d Cong., 2d Sess. pp. 5-8 (1954). It further noted that Congress made specific mention of the court as one of the guardians to see that these limtiations are met. 304 F.2d at 636; H. Rep. No. 2606, *supra,* at 8. It therefore concluded

> "it is the judge, not the government's attorney, who makes the judgment [on whether the statutory limitations are met], and he obviously cannot decide except on the basis of facts presented." 304 F.2d at 636.

This continued Congressional concern was further evidenced as recently as 1961 when the Department of

Justice requested a new immunity statute as part of the Attorney General's Program to Curb Organized Crime. The requested immunity statute was limited to Taft-Hartley and Hobbs Act violations. During the Senate Hearings while Herbert Miller, Assistant Attorney General in charge of the Criminal Division, was testifying, Senator Kefauver raised the issue of general immunity baths,

> "Sir, what do you say about the objection raised that this would give somebody an opportunity of testifying about other matters and thereby give a general immunity which might not just refer to the Hobbs Act and the Taft-Hartley Act, and people who are forced to testify under terms of this bill, might use that as an opportunity of getting a general immunity bath, as it is called?"

Hearings on S. 1653 through S. 1658 and S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., p. 246 (1961). To this, Assistant Attorney General Miller replied:

> ". . . As a practical matter, the rules of evidence, particularly that of relevant testimony, would limit the man who was testifying to the material facts of the Hobbs Act or Taft-Hartley Act violation, and he would not be permitted to give himself an immunity bath."

Ibid. In fact, at a later point, Mr. Miller went on to point out that the Department of Justice had just opposed a proposed immunity statute in the House which would have applied to "any Federal crime involving interstate commerce." *Id.* at 273. He gave the rationale of the Department's position as follows:

> "It was felt that this was too broad an approach, and that we should limit it to particular situations where . . . we could demonstrate that there

was a real need for this type of an immunity." *Ibid.*

Apparently Congress was not impressed with the need for even the narrower Hobbs-Act-Taft-Hartley-Act request since it refused to pass any immunity act at all with this legislation.

It is thus apparent that Congress intends all immunity statutes, including 47 U.S.C. § 409(L), to be strictly limited to the subject matter set forth within them. Moreover, the Department of Justice itself has informed Congress of the manner in which this is done. As Assistant Attorney General Miller stated, application of the normal rules of evidentiary relevance will limit immunity to those questions and answers which concern facts material to the violations set forth in the immunity statute.

Clearly, therefore, any court applying an immunity statute must (1) have sufficient facts before it to assure that these limitations are met, and (2) limit its order to compel testimony to areas of inquiry relevant to the violations set forth in the immunity statute. In the case at bar, both of these requirements were ignored.

III. THE TRIAL COURT MUST RULE ON THE RELEVANCE OF QUESTIONS TO THE IMMUNITY STATUTE AT THE TIME THE ARE ASKED

It is conceded that the petitioner was justified in relying on the Fifth Amendment during his interrogation on May 14 and May 19 before the grand jury. Moreover, under *Brown* v. *United States,* 359 U.S. 41, 50 (1959), he was entitled to continue his reliance on the Fifth Amendment until a court found, after applying the proper standards of law, that the Fifth Amendment right had been superseded by a valid im-

munity statute. Even then the petitioner would be entitled to stand on his rights and risk contempt in order to assert on appeal that there was insufficient evidence to justify the court's findings.

More is at stake in these decisions by the witness than his inalienable right to assert his constitutional rights under the Fifth Amendment. For the Second Circuit in *United States* v. *Harris,* 334 F.2d at 462, has already ruled that it will not honor a grant of immunity unless the testimony given actually "bears a substantial relation to the subject matter of the immunity provision." The witness therefore may be risking incrimination for which he will not receive protection from prosecution.

In many ways, the position of the petitioner at the time he appeared before the grand jury is not unlike that of a witness before a Congressional committee. In *Watkins* v. *United States,* 354 U.S. 178 (1957), the petitioner had been convicted for contempt of Congress for refusing to answer questions before a congressional committee. The Court held that a witness was entitled to refuse to answer if the questions were not pertinent to the scope of the congressional inquiry, and it reversed the conviction on the ground that the witness had not been informed of the relevance of the questions at the time that they were asked. The Court pointed out that where the subject matter under inquiry was unclear, the "investigative body" had the duty to clarify it on the witness's request. And, the Court added,

> "To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." *Id.* at 215.

The Court concluded that the relevance of the questions put to Watkins had never been made clear, and

> "Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance." *Id.* at 214.

In the committee case, of course, if the question was irrelevant, the witness need not answer because the question itself was improper. In the case at bar, any grand jury question is proper, but if it is not pertinent to a violation within the immunity statute, the witness is entitled to invoke the Fifth Amendment. Thus, although the framework is different, the issue of "fundamental fairness" or due process of law for the petitioner is identical.

For these reasons, the witness is entitled to have before him at the time the immunity statute is invoked all the evidence needed for him and the court to determine whether the immunity statute does in fact apply. And if the court refuses to apply the proper standards of law and refuses to make the proper findings of fact as happened in this case, the witness may continue to rely on his Fifth Amendment rights. Since the Seventh Circuit failed to recognize these propositions in this case, petitioner is entitled to a reversal from this Court.

IV. THE COURTS OF APPEALS HAVE ABANDONED FUNDAMENTAL LEGAL PRINCIPLES IN AFFIRMING CONTEMPT CONVICTIONS

The most serious issue that can face any court of law is the application of a legal remedy which incarcerates a man in a prison cell, whether it be the result

of civil contempt, criminal contempt, or a criminal conviction. While the Courts of Appeals have accorded the defendant subject to a criminal conviction every possible safeguard in recognition of this fact, they have failed to extend even rudimentary legal rights to the victim of civil and criminal contempt.

In the case at bar, the petitioner has raised serious and substantial legal objections in the trial court and the Court of Appeals. Yet no court has yet been willing to extend the petitioner the elemental right of stay of execution of his incarceration. No defendant under criminal conviction would be denied bail pending appeal if he could show similar issues of substance.

In *United States* v. *Harris, supra,* the witness was sentenced to one year for criminal contempt. The government first introduced the tariffs of the telephone company (upon which it based its whole theory of violation of the FCC Act) as an appendix to its brief in the Court of Appeals.[5] The Second Circuit not only relied on this evidence in its opinion but then based its affirmance on speculation as to facts not even suggested in the record. No Court of Appeals in this country would affirm a felony conviction on the basis of evidence not before the trial court and on its own unsupported speculation as to the facts.

In *United States* v. *Testa, supra,* the Third Circuit affirmed a civil contempt conviction *per curiam* on the basis of its earlier decision in *Marcus.* Yet, as the dissent points out, neither the facts nor the legal issues were comparable between the two cases.

Finally, in the case at bar, the Seventh Circuit, as

[5] See *Harris* v. *United States,* Petition for Writ of Certiorari to the United States Supreme Court, October Term, 1964, No. 526, at p. 11.

one of its alternative bases for affirmance, relied on evidence not before the trial court. In part (2) of its opinion, App. pp. 5a-7a, it held that it need not rule on the relevance of petitioner's questioning during the May 14, and May 19, grand jury sessions because the contempt was based on a refusal to answer only a limited number of questions asked after entry of the order to compel testimony. However, the transcript of the grand jury session after entry of the order to compel testimony was not brought to the attention of the trial court; it was not introduced into evidence as the prior transcripts had been; and it first made its appearance in the Court of Appeals on the insistence of the Government as Exhibit E.[6]

Petitioner contends that in each of these cases, the Court of Appeals has engaged in practices which if applied to a felony conviction would constitute a blatant denial of due process of law. The rationale for such an indifferent attitude on the part of these courts to incarceration for contempt is difficult to fathom. But it is apparent that it will continue until called to a halt by this Court.

MOTION TO STAY EXECUTION OF PETITIONER'S COMMITMENT FOR CONTEMPT

The petitioner has already spent over five months in jail pursuant to his civil commitment for contempt. Since the first day of his commitment, six motions for stay pending appeal have been made and denied. In the meantime, the petitioner has used every effort to speedily exercise his appellate rights. Notice of appeal were filed the day of petitioner's commitment, and, in response to the petitioner's motion for an early hearing, the appellate argument was held in the opening days of the Court of Appeals fall term in Septem-

[6] See note 2, *supra;* App. 11a.

ber. The present petition for writ of certiorari has been prepared promptly.

Therefore, in the event this Court grants the petition for writ of certiorari, petitioner moves this Court to stay execution of his commitment for contempt pending argument and decision on the merits. Petitioner is agreeable to conditioning the stay upon the posting of bond in any reasonable amount which the Court may specify. Petitioner represents that if certiorari is granted, he will prepare his brief on the merits promptly and accept the earliest possible hearing date for argument.

In view of the fact that this Court can hear and decide this case several months prior to the expiration of the term of the grand jury before whom petitioner was subpoenaed, petitioner fails to see how the Government will be prejudiced by the granting of this motion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted, and, if granted, the motion for stay of execution of petitioner's commitment for contempt should also be granted pending argument and decision on the merits.

Respectfully submitted,

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NOVEMBER, 1965 *Counsel for Petitioner*

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1965 September Session, 1965

Nos. 15178-15179

In Re: Grand Jury Investigation
SAM GIANCANA, *Appellant*

In the Matter of the Application for
Writ of Habeas Corpus,
SAM GIANCANA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

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October 8, 1965

Before SCHNACKENBERG, CASTLE and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Sam Giancana has appealed, in case No. 15178, from an order of the district court entered June 1, 1965, adjudging him in contempt of court for failure to obey an order of that court dated June 1, 1965, and he has also appealed, in case No. 15179, from an order of that court entered June 2, 1965, denying his petition for a writ of habeas corpus.

Pursuant to subpoena, appellant, sometimes herein referred to as respondent, appeared on May 14, 1965 before a grand jury of said district court. Before being sworn, appellant learned from the assistant United States attorney who was present before the grand jury that appellant was a prospective defendant. He was questioned extensively on May 14, 19 and 27, 1965. With the exception of questions asking his name and address and the name of his lawyer, he invoked his privilege against self-incrimination under the fifth amendment and refused to answer all questions. He persisted in so doing after the grand jury invoked the provisions of 47 U.S.C. § 409 (*l*), which is a part of the Federal Communications Act relating to self-incrimination. On the latter date, appellant was brought before the court and the hearing was continued until June 1, 1965, on request of his counsel to permit him to better advise his client.

On June 1, 1965, the court ordered appellant to answer questions put to him by the grand jury. However, upon returning to the grand jury on June 1, he persisted in his refusal and was again brought before the court on the motion of the United States attorney to enforce the court's order to compel appellant to testify. Thereupon the prosecutor told the court that appellant was sworn that morning before the grand jury, and, after giving his name and address, he refused to state his telephone number on the ground of the fifth amendment. The following thereupon transpired:

> "The court: Is this correct, what the United States Attorney just said? Did you so refuse?
>
> "The respondent: Yes, sir."

Thereupon, at the request of defense counsel, the court permitted appellant to consult privately with his attorney, who thereafter stated to the court that he had so conferred and that his client informed him that he did refuse to answer questions.

The following thereupon ensued:

"The court: Do you continue to so refuse?

The respondent: Yes, sir.

The court: You will not answer the questions as ordered by the Court heretofore?

The respondent: That's right.

The court: Very well, then I adjudge the respondent, Sam Giancana, in direct and continuing contempt of this Court for disobedience of its lawful order, and I commit the respondent, Sam Giancana, to the custody of the United States Marshal there to remain until he obeys the lawful order of the Court.

The Marshal is directed to allow the respondent, Sam Giancana, to see his attorney whenever he requests to do so.

You have the key to your own cell. Whenever you decide to obey the lawful order of the court so notify the Marshal and he will bring you before the Grand Jury. Until such time you will remain in the custody of the United States Marshal, who is directed in this period of time to confine the respondent to a common jail within this district."

1. Counsel for appellant recognize that the determination of the applicability of an immunity statute must rest with the court. They state that the issue presented is whether 47 U.S.S. § 409 (*l*)[1] superseded appellant's right to invoke the fifth amendment with respect to each of those

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[1] (*l*) No person shall be excused from attending and testifying • • • in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty of forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

questions which had been asked. But their position is that the normal rules of evidentiary relevance will limit immunity to "those questions and answers which concern facts material to the violations set forth in the immunity statute". However, the government points out that the Supreme Court struck down a similar argument in *Brown* v. *United States*, 359 U.S. 41 [2] at 46, where the court said, in considering Part II of the Interstate Commerce Act, which relates to motor vehicles:

> "The petitioner argues alternatively that even if some immunity is granted by Part II to a grand jury witness, the immunity is not commensurate with that of Part I, and that its scope is therefore constitutionally insufficient. The contention is that § 305 (d) [49 U.S.C.A. § 305 (d)] provides immunity from prosecution only for offenses related to violations of the Motor Carrier Act itself because of the clause appearing at the beginning of the section—'So far as may be necessary for the purposes of this chapter.' • • • Assuming that this clause limits the immunity provision of the section at all, it clearly limits only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred.• • •"

The application of the holding in *Brown* to the case at bar requires that we recognize that 47 U.S.C. § 409 (*l*) supports the order of the district court granting immunity to appellant and directing him to answer questions put to him before a grand jury which was conducting an investigation involving possible violations of various statutes, including the Federal Communications Act, 47 U.S.C. §§ 203 and 501.[3]

---

[2] In *Brown*, respondent was punished for *criminal* contempt and sentenced to imprisonment.

[3] It appears from the affidavit of the United States attorney that the grand jury was conducting an investigation involving possible violations of various federal statutes, including said §§ 203 and 501.

This conclusion as to the scope of the immunity granted appellant is in conformity with, not only the plain meaning of the statutory language of this broad grant, but also of the constitutional requirement that the immunity granted to a witness shall extend to any transaction, matter or thing concerning which he may testify. *Brown* v. *Walker*, 161 U.S. 591, 607-8. *Walker* holds, at 608, that the immunity granted is intended to be *general* and to be applicable whenever and in whatever court such prosecution may be had.[4]

The court of appeals for the Second Circuit succinctly stated in *United States* v. *Brown*, 247 F.2d 332, 337:

> "* * * From this it follows that Brown has no right to remain silent because of some fancied prosecution which may never happen. It is enough for him to know that he is fully protected. The government has been empowered by Congress to pay the price of immunity for Brown's testimony. Should the need ever arise the courts will see to it that the bargain is fully kept."

2. However, in this court, appellant's counsel assert that in this case "any grand jury question is proper, but if it is not pertinent to a violation within the immunity statute", the witness is entitled to invoke the fifth amendment. On oral argument here, his counsel stated that he considers irrelevant numerous questions[5] put to appel-

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[4] See also, to the same effect, *Reina* v. *United States*, 364 U.S. 507, 513, 514 (1960); *United States* v. *Coplong*, 6 Cir., 339 F.2d 192, 193 (1964); *In re Lane*, 224 F. Supp. 317 (D.C. N.D. Ill. 1693).

[5] In response to the argument of appellant regarding supposed irrelevant questions asked by the grand jury, the grant of immunity under § 409 (*l*) was "complete" and extended to any transaction, matter or thing as to which appellant might be interrogated before the grand jury. The possible irrelevancy of any question asked him would not lift his immunity in the least.

lant before the grand jury, all of which he declined to answer on the ground that to do so might tend to incriminate him. Counsel identify these questions as those appearing on *pages 46-7* and *301-7* of the transcripts of evidence herein. These transcripts reveal that these questions were put to respondent before the grand jury on May 14, 1965 and May 19, 1965, respectively, but it is important to note however that these questions were ***not*** put to appellant at the grand jury hearing of June 1, 1965. Hence, we hold that his charge of irrelevancy can have no application to the contempt proceedings in open court on June 1 which are the basis for the orders involved in these appeals.

Moreover, we are convinced that, even if we consider the charge of irrelevancy as properly before us, no error has been shown. From a thorough examination of the transcripts and particularly the questions considered by appellant's counsel to be irrelevant, we disagree with that characterization. We are unable to say that answers responsive to these questions might not logically be of assistance to the grand jury. That body may, by various avenues of interrogation, exercise its traditional functions in such a way as to elicit information about possible criminal violations. In seeking to establish the facts, a grand jury, in framing its questions to a witness, may adapt its form of approach to that most strategically suited to elicit the facts. Its form may be direct or indirect. If the latter, certain questions might be considered irrelevant if standing alone, when they are actually relevant as a part of a plan to elicit material information on a subject under consideration by the jury.

Furthermore, we attach considerable significance to the fact that appellant, in raising the point that the questions put to him were not pertinent or relevant, was not selective in his attitude as a witness before the grand jury. He was not merely resisting the answering of *irrelevant* ques-

tions; he was determined not to answer *any* questions, after he stated his name and address, and the name of his lawyer. His recalcitrance was total before the grand jury (and later before the court) and he did not base his refusal on lack of relevancy or any other reason, except the fifth amendment. Clothed with complete immunity by the court's ruling, he nevertheless continued to defy the jury and the court. His incarceration until he should comply with the court's order followed.

Significantly the only purpose of his imprisonment has been to coerce him to answer questions—not to punish him for his failure to answer at the times he had been before the grand jury.

3. We believe that appellant can find no support in the case of *In re Bart,* D.C. Cir., 304 F.2d 631 (1962), which he cites. That case was dependent upon the provisions of 18 U.S.C.A. § 3486, sometimes called the Immunity Act of 1954, or the Compulsory Testimony Act. The court held that act applied only if the testimony of the witness is "in the judgment of a United States attorney • • • necessary to the public interest". It also required "the approval of the Attorney General." At 635, the Court of Appeals pointed out a more important limitation in the application of the statute; *i.e.,* it was limited to a proceeding involving interference with or endangering of the national security or defense, including violations of the Internal Security Act of 1950. Obviously, *In re Bart* has no relevancy here, where no such limitations are involved.

4. A persuasive decision is *Marcus* v. *United States,* 3 Cir., 310 F.2d 143 (1962); cert. den. 372 U.S. 944 (1963). That case involved a grant of immunity to Marcus, pursuant to 47 U.S.C. § 409(*l*). At 145, the court said that § 409(*l*) is applicable in any criminal proceeding involving alleged violations of the Communications Act. At 146, the court said:

"The immunity conferred by the statute involved here, like that in Brown v. U.S., supra, is the automatic statutory consequence of compulsory testimony. The immunity is as extensive as the testimony. The contention is groundless that the immunity conferred is limited to proceedings based upon or growing out of the Communications Act. As stated in Brown, the reference to that Act 'limits only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred.' 359 U.S. at 47, 79 S.Ct, at 544, 545, 3 L.Ed. 2d 609.

"Indeed the facts in the Brown case are so closely parallel to those in the case at bar that petitioner's appeal is well-nigh frivolous."

While the briefs for both parties here make reference to *United States* v. *Harris*, 2 Cir., 334 F.2d 460 (1964), we refrain from discussion of that case, which is now awaiting argument in the United States Supreme Court on a limited grant of certiorari. 379 U.S. 944 (1964).

For these reasons, the orders of the district court, from which these appeals were taken, are affirmed.

ORDERS AFFIRMED.

KILEY, *Circuit Judge*, concurring.

Appellant contends that the district court failed to make findings of fact, upon sufficient evidence, as required by *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962), to establish the "substantial relation" under the *Harris* rule [1] with respect to each area of questioning by the grand jury, and that the court's failure denied him due process.

---

[1] *United States* v. *Harris*, 334 F.2d 460, 462 (2d Cir. 1964): "If the statutory provision under which the grand jury is proceeding extends immunity to the prospective witness, that immunity extends to all testimony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision."

He argues that the district court had the duty of finding the "substantial relation" of the questions asked, and challenged, before ordering him to testify, and could not delegate this duty to him and the grand jury. I assume for purposes of this argument that the court had the duty claimed and that in asking "what is the relevancy" of the lack of "substantial relation" the court misconceived the *Harris* rule. The court ordered appellant to answer all the questions that had been asked, and ruled that the immunity extended to all. The record does not show the questions referred to were not substantially related "in context"[2] to violations of the Act, and shows the immunity extended to them. The ruling was right even if the reason was wrong, and there was no denial of due process. The decision of *In re Bart, supra,* requiring "findings of fact" on sufficient evidence to support the application of the Attorney General for invocation of the immunity statute there has no application to the immunity statute here.

But appellant contends that even if not invalid in the respect noted, the district court's oral order was invalid in another respect, and that under a statement of the Supreme Court in *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951), the entire order must fall.

The statement in *Bowman Dairy*—which was applied in *United States* v. *Patterson,* 206 F.2d 433 (D.C. Cir. 1953)—is: "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad." 341 U.S. at 221. The district court's oral order, so far as is pertinent, is: ". . . to proceed forthwith . . . to testify fully and completely on matters heretofore propounded . . . and *likewise to testify fully and com-*

[2] *Marcus* v. *United States,* 310 F.2d 143 (3rd Cir. 1962).

pletely on any—and truthfully on any and all other matters propounded to him by the Grand Jury or by any officer asking questions in its behalf." (Emphasis added.) Appellant argues that the italicized part of the district court's order is too broad, under *Harris*, and thus the entire order falls, under *Bowman Dairy*.

The *Bowman Dairy* statement is inapplicable to the oral order here challenged by appellant. In *Bowman Dairy* and *Patterson* the court and Congress issued the subpoenas and were in a position to do prospectively what *Bowman Dairy* said the trial court should have done—make certain that the subpoena was good and not leave this function to the witness. But the grand jury asks the questions under its independent power. And the court's function is retrospective.[3] Appellant invoked the Fifth Amendment after immunity was granted, the grand jury directed him to appear before the district court, and the court's function was to pass on the questions already asked and determine whether the answers would be clothed with the immunity granted. It was not the function of the court to order in advance what questions the witness should or should not answer; and accordingly it had not the duty to fashion an order "good in its entirety" for that purpose. The district court's oral order is not invalid under *Bowman Dairy*.

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[3] As the court stated in *In re Bart*, 304 F.2d 631, 637 & n. 18, (D.C. Cir. 1962):

> "It will be time enough, later, to object to the relevancy of the questions asked.[18]
>
> "[18] The witness will, of course, have an opportunity to be heard, with the assistance of counsel, before he is punished for contempt. The proper time to object to the relevancy of the questions propounded is when the witness is summoned before the court for failure to comply with the order compelling testimony."

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois, 60610

Wednesday, June 9, 1965

Before ELMER J. SCHNACKENBERG, *Circuit Judge.*

In Re: Grand Jury Investigation SAM GIANCANA, *Appelant,* No. 15178	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now comes Edward V. Hanrahan, United States Attorney for the Northern District of Illionis, and moves this Court for the entry of an order directing the Clerk of this Court to file as a supplemental record on appeal Government's Exhibit E, heretofore certified and transmitted to this Court on June 7, 1965, by the Clerk of the United States District Court for the Northern District of Illinois, pursuant to entry of an order by Judge Joseph S. Perry, dated June 7, 1965.

On consideration whereof, IT IS HEREBY ORDERED that the said motion of Edward V. Hanrahan be and the same is hereby granted, without prejudice.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 726

SAM GIANCANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1965. The petition for a writ of certiorari was filed on November 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury proceedings were, in the words of the immunity provision of the Federal Communication Act, "based upon or growing out of any

alleged violation of this Act," so that the district court was empowered to grant immunity to petitioner and compel his testimony.

2. Whether petitioner could refuse to testify on the ground that the questions were not relevant to the inquiry.

STATUTE INVOLVED

Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 66 Stat. 721, 47 U.S.C. 409, provides in pertinent part:

> (l) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

STATEMENT

Petitioner was found in civil contempt for having refused to obey a court order of June 1, 1965 to testify before a federal grand jury after being informed that he would be immune from prosecution growing out of his crimes. He was committed to the custody of the United States Marshal until he obeyed the order. The facts leading to his commitment may be summarized as follows:

On May 14, and May 19, 1965 petitioner appeared before the grand jury under subpoena. He was advised that the grand jury was investigating possible federal violations including Federal Communication Act violations, gambling, extortion and interstate travel in aid of racketeering. After being so advised, he was excused from the grand jury room and permitted to confer with counsel. Petitioner refused to answer any questions, other than his name and address, on the ground that the answers might incriminate him. He was asked, and refused to answer, such questions as the following: whether he had calls charged to his home telephone; who used his home telephone; whether he used any other person's credit card in placing long distance calls; whether he called particular named persons; and whether certain matters, including payment for issuance of a building permit, were discussed in telephone conversations of a particular date. He was also asked whether a portion of his gambling income came from two particular establishments (Exhibits B & C).

On May 27, petitioner again appeared before the grand jury under subpoena. The foreman of the

grand jury told him that the grand jury was investigating possible violations of 47 U.S.C. 203 and 501 and that the Assistant United States Attorney was going to ask him questions in furtherance of this investigation. He was informed that he would be "immune from prosecution or subjection to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which you might testify or produce evidence before this Grand Jury." Petitioner still refused to answer any questions, again claiming the privilege against self-incrimination. He was directed to appear before the court (Exhibit D).

The United States Attorney requested an order pursuant to 47 U.S.C. 409(l) directing that petitioner not be excused from testifying and that petitioner not be subject to prosecution for any matter about which he would be compelled to testify (A. 7–11). On June 1, 1965 petitioner appeared in court and, through counsel, opposed this request on two grounds. He argued that the government should designate the question which it wished petitioner to answer and that petitioner should not be required to answer any additional questions until the court ruled "whether there is a substantial relationship between the new matter that the Grand Jury is investigating and an FCC violation" (A. 16–17). The court rejected his objections and ordered petitioner to answer the questions. It advised petitioner (A. 21):

> * * * that the immunity heretofore extended by the statement of the Foreman of the Grand Jury invoking the Statute of which you have already been advised is full and complete. It

> will protect you against any possible incrimination, State or Federal, in any possible jurisdiction. It is complete, permanent and absolute, and under such complete immunity, I now order and direct you to return and answer fully the questions already propounded to you as to which you have invoked the Fifth Amendment protection, and any other questions that the Grand Jury may, in the discretion of its Foreman, permit to have asked you.

Later that day, the court repeated, in response to a request for clarification of his order by petitioner, "that the record already made * * * encompasses and anticipates any and all questions, including those already asked [petitioner] and any others, and that the immunity which I have heretofore defined for him applies with reference to any testimony that he gives, whether it be in answer to a question heretofore asked or any other question that may subsequently be asked" (A. 25).

Petitioner returned to the grand jury. After giving his name and address, he again declined to answer any questions. He was brought before the court and found to be in contempt of its order to answer the questions. The court committed him to the custody of the United States Marshal until he answered the questions (A. 28–33).

ARGUMENT

1. The claim that the subject matter of the inquiry did not meet the statutory condition upon which the application of the immunity provision depends is the same issue which the Court declined to review in

United States v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931; *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; and *United States* v. *Harris*, 334 F. 2d 460 (C.A. 2), No. 6, this Term (certiorari granted on other issues, but not as to the grant of immunity). As in those cases, the grand jury in this case was conducting an investigation "based upon or growing out" of alleged violations of the Federal Communications Act. Both the grand jury foreman and the United States Attorney informed petitioner that the grand jury inquiry was conducting a broad inquiry whose scope included possible violations of Section 203 and 501 of that Act (see Statement, *supra*, pp. 3–4). The district court could properly accept these statements as to the investigative purpose of the grand jury.

Moreover, the questions asked petitioner show that the grand jury was investigating the interstate use of the telephone for unlawful purposes (see Statement, *supra*, p. 3). Under the cases cited, such action would be a violation of the Communications Act in that it would cause the telephone company to violate its tariff. It is not necessary, as petitioner contends, that he be a common carrier in order to be convicted under Sections 501 and 203 of the Federal Communication Act. This is demonstrated by *United States* v. *Andrews*, 347 F. 2d 207 (C.A. 6), petitions for writs of certiorari pending, Nos. 607, 703, 706–707, this Term, where several individual defendants were convicted under a count in the indictment which charged them with wilfully and knowingly causing the telephone company to provide serv-

ice for an unlawful purpose, *i.e.*, the transmission of wagers in violation of the tariff filed by the carrier. In other words, they violated Section 501 by wilfully and knowingly causing an act to be done in violation of Section 203, namely, the furnishing of a communication service not permitted by the tariff.[1] Nor is it significant under the cases cited above that the grand jury was investigating possible violations of other statutes as well. As long as the grand jury was investigating possible violations of the Communications Act, it was proper to invoke the immunity provisions of that Act in relation to the entire subject matter then under investigation.

2. There is no substance to petitioner's claim that if he testifies before the grand jury he will not receive

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[1] In addition to the provisions of Section 501 of the Communications Act, penalizing anyone who willfully causes or suffers an act to be done in violation of the Act, the general aider and abettor statute, 18 U.S.C. 2, may also be applied to make individuals liable as principals to violations of Section 203(c) of the Act. Section 2(b) of Title 18 U.S.C., punishes as a principal one who "willfully *causes* an act to be done which if directly performed by him or *another* would be an offense against the United States" (emphasis added). It is well established that one who causes the commission of an offense by an innocent agent or instrumentality is guilty as a principal (*United States* v. *Giles*, 300 U.S. 41; H. Rep. No. 304, 80th Cong., 1st Sess., p. A5; see Reviser's Note to 18 U.S.C. 2(b)), even though he was incapable in the first instance of committing the substantive crime (S. Rep. No. 1020, 82d Cong., 1st Sess., Sec. 17B, pp. 7–8; see *Phillips* v. *United States*, 218 F. 2d 385, 387 (C.A. 9); *Logsdon* v. *United States*, 253 F. 2d 12, 15 (C.A. 6); *Benchwick* v. *United States*, 297 F. 2d 330, 332–333 (C.A. 9); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D. Ill.)).

protection from prosecution unless the court rules on the relevance of each question asked. The immunity granted would not be limited to those questions which directly involve a specific violation of the Act pursuant to which immunity was granted. Once it is shown that the grand jury is investigating a violation which is subject to an immunity statute, the witness obtains immunity, State and federal, as to all questions within the range of the general subjects under investigation. This is a requirement of the Constitution (*Ullmann* v. *United States*, 350 U.S. 422; *Albertson* v. *Subversive Activities Control Board*, No. 3, this Term, decided November 15, 1965) which is fully satisfied by the plain wording of the statute. Section 409(l) of Title 47 provides that "no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence."

It is of course true that before the immunity attaches the court must find that the grand jury inquiry does, at least in part, relate to an area which falls within an immunity statute. As we have shown, that relationship was established in this case. However, once it is found that the grand jury is conducting an inquiry into a field where immunity pertains, then the witness obtains full immunity as to everything arising out of that inquiry, including acts which might constitute a violation of some other statute. It may be that, if a grand jury enters a field totally unrelated to the

general *subject matter* of the inquiry under which immunity is granted, an issue might arise as to the duty to testify. That is the "substantial relationship" to which the Second Circuit referred in *Harris*. This does not mean, and no court has held, that every question must relate to the particular violation under which immunity is granted.[2]

It appears from the opinion of the court of appeals that on argument petitioner's counsel contended that some questions put to petitioner on May 14 and May 19 were irrelevant (Pet. App. 5a–6a). The court of appeals found it unnecessary to pass upon that claim since those questions were not put to petitioner on June 1, after the grant of immunity.[3] It went on to hold the questions in any event relevant and to note that petitioner was refusing to answer all questions, not merely those he considered irrelevant. Since petitioner argues here only the general proposition that each question must relate directly to a Communications Act violation—a contention which is untenable under the authorities—we think no issue as to any particular question is before the Court.

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[2] Under the statute involved in *In re Bart*, 304 F. 2d 631 (C.A.D.C.), 18 U.S.C. 3486, the court is specifically required to make a finding that the offense under investigation involved "interference with or endangering of * * * the national security or defense."

[3] After petitioner appeared before the grand jury on June 1, the United States Attorney told the court what had occurred before the grand jury. Petitioner's attorney agreed that it was not necessary to call the reporter to testify *in haec verba* (A. 28–29). In these circumstances, petitioner was in no way prejudiced when the court of appeals was furnished with the transcript of his grand jury testimony on June 1.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965